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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 63

NEWS PRINTING CO., INC.,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER, NEWS PRINTING CO., INC.

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CITATIONS

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OPINIONS BELOW

The opinion of the District Court (R. 22-28) is reported in 49 F. Supp. 659. The opinion of the Circuit Court of Appeals (R. 89-98) is reported in 148 F. 2d 57.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 5, 1945 (R. 98). Petition for writ of certiorari was filed on April 19, 1945, and was granted on May 21, 1945.

The jurisdiction of this Court is based on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. Sec. 347(a)).

QUESTIONS PRESENTED

1. Whether in a proceeding instituted for the purpose of compelling compliance with the commands of a subpoena duces tecum, the respondent therein in response to an order to show cause is barred from making the defense that it is not engaged in commerce or in the production of goods for commerce and therefore is not subject to the Act invoked.

2. Whether petitioner is engaged in commerce or in the production of goods for commerce within the meaning of the Act.

3. Whether the Administrator, acting in an executive capacity, in the absence of any complaint or charge of violation of law, has the power in the light of the provisions of the Fourth Amendment to the Constitution of the United States to make general and routine investigations of all private businesses, including petitioner's, by delegating power to a horde of inspectors with instructions to enter all places of business, including petitioner's, there to fish through their books, papers and records for the purpose of determining whether possibly there have been violations of the Fair Labor Standards Act.

4. Whether Congress has the power, in the light of the provisions of the First Amendment to the Constitution of the United States prohibiting the abridgment of the freedom of the press, to regulate the press.

5. If it be held that Congress has the power to regulate the business of the press, then, in view of the provisions of the First and Fifth Amendments to the Constitution of the United States, whether Congress has the power for the purpose of such regulation arbitrarily to classify the press on the basis of volume of circulation, area of distribution and frequency of issue in such a manner as to exempt thousands of newspapers from the burdens of the Act, while subjecting all others engaged in the same business to those burdens.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are Article I, Section 8, Clause 3 of the Constitution of the United States and the First, Fourth and Fifth Amendments to the Constitution of the United States. These provisions are set forth in the Record, pages 71-72.

The statutory provisions involved are those embraced in the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. 201 *et seq.*) and Sections 9 and 10 of the Federal Trade Commission Act (38 Stat. 722-723, 15 U. S. C. Secs. 49 and 50). These provisions are set forth in the Record, pages 72-88.

STATEMENT

Petitioner is engaged in Paterson, New Jersey, in the business of publishing the "Paterson Evening News", a daily newspaper published each weekday evening throughout the year. Less than one per cent of its circulation of more than 27,000 copies daily is distributed outside of the State of New Jersey (R. 20).

On July 10, 1941, one Henry L. Karabel appeared at petitioner's offices, represented himself to be a duly authorized representative of the Administrator of the Wage and Hour

Division, and sought to examine petitioner's books, papers and records. Petitioner refused to permit any such search (R. 4-5, 16-17).

On May 20, 1942, one Leo A. Mault appeared at petitioner's offices and handed petitioner's president a duplicate original of a paper purporting to be a subpoena duces tecum signed by the Administrator of the Wage and Hour Division, commanding petitioner to appear before officers of the Wage and Hour Division at Newark, New Jersey, on May 27, 1942, to testify and to produce certain papers (R. 5-6, 8-9, 18). Petitioner refused to comply with the purported subpoena.

Thereupon, the Administrator applied to the District Court for the District of New Jersey for an order of enforcement of the aforesaid subpoena (R. 2-8).

In its return to the order to show cause and answer to the petition of the Administrator for enforcement of the purported subpoena, petitioner denied essential jurisdictional facts, namely, that the Act is applicable to the business of petitioner; that the Administrator had jurisdiction over petitioner's affairs; and that the District Court had jurisdiction in the premises (R. 12). Petitioner also asserted as defenses that the attempted application of the Act to its business violated its rights as guaranteed by the First, Fourth and Fifth Amendments to the Constitution of the United States (R. 13).

The District Court held that petitioner had properly raised the question of coverage of its business by the Act and that the Administrator was not entitled to enforcement of the subpoena herein unless such coverage was established. The order to show cause was vacated and the petition of the Administrator was dismissed (R. 28-29).

The Administrator appealed to the United States Circuit Court of Appeals for the Third Circuit. Argument

on this appeal was heard on December 22, 1943, in Philadelphia, Pennsylvania.

On March 5, 1945, the Third Circuit Court of Appeals, by a divided court, reversed the judgment of the District Court.

Petitioner then filed a petition for a writ of certiorari with the Court on April 19, 1945 and certiorari was granted on May 21.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that, in a proceeding to enforce a subpoena in which the respondent therein had raised the question of coverage, the Administrator's allegation on information and belief that respondent is subject to the Act constitutes a sufficient showing to justify enforcement.

2. In permitting the Administrator to conduct a fishing expedition into petitioner's books, papers and records in violation of petitioner's rights as guaranteed by the Fourth Amendment.

3. In failing to pass upon the free press argument as this argument was presented to it by petitioner.

4. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

POINT 1. The holding of the Circuit Court in the present case where petitioner has denied that it is subject to the Act that the mere allegations on information and belief of the Administrator that petitioner is subject to the Act constitute a sufficient showing to entitle him to enforcement of a subpoena is in conflict with the decision of the Eighth Circuit Court of Appeals in *Walling* v. *Benson,* 137 F. 2d

501 (1943), and the Sixth Circuit Court of Appeals in *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. 2d 596 (1942). It violates petitioner's rights as guaranteed by the Fourth Amendment and subjects petitioner to unauthorized searches by the Administrator. No lawful purpose can be served by these searches so petitioner should be permitted to bar the trespasser at the threshold. If the Circuit Court is right in holding that the question of coverage can be tried only in a proceeding to enforce the sanctions of Section 16 of the Act, a citizen not subject to the Act may never be able to have the question tried and thus may never be able to free himself from these inspections. It is submitted that in accepting this Court's decision in *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501 (1943), as "persuasive" authority for its decision in the present case, the Circuit Court failed to recognize the fundamental differences between the Walsh-Healey Act under which that case arose and the Act involved here. It is further submitted that the other cases cited by the Circuit Court for its decision are not applicable to the present case.

POINT 2. The Administrator began his attempted investigation of petitioner's business in the absence of complaint and simply as a part of a program of making routine investigations of all businesses and industries in the United States. Congress, in enacting the Fair Labor Standards Act, did not intend to authorize such a program. On the contrary, it has expressed emphatic disapproval of the Administrator's policy. The investigation attempted here is nothing more than the "fishing expedition" condemned by this Court as a violation of the Fourth Amendment in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298 (1924). We have to go back more than 180 years in our history to find a parallel to this proceeding and we find it in the use of the notorious writs of assistance. The

Fourth Amendment was written to protect citizens from such unlawful searches and it still stands as a bulwark against the invasion of individual rights attempted by the Administrator herein.

POINT 3. The fact that petitioner receives news, feature articles and other materials from out of state does not bring petitioner within the coverage of the Act. The interstate movement of these materials ends when they reach petitioner. They are processed into an entirely new article before they are passed on to petitioner's readers. The business of publishing a local newspaper is a strictly local business and is not within the coverage of the Act. The fact that one per cent of its circulation goes out of state does not bring petitioner within the purview of the Act. This trifling out of state circulation could not possibly have the detrimental economic effect on interstate commerce which this Act was intended to control. Moreover, this out of state circulation falls within the *de minimis* doctrine.

POINT 4. The Circuit Court of Appeals failed to pass upon the free press argument as this argument was presented to it by petitioner. Petitioner has shown that under the decision of this Court in *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), this Act cannot be applied to the newspaper publishing business for it lays a direct burden on the business of the press. If a publisher is limited in his operations by the application of the burdens of the Act, he will be unable to serve his readers adequately. Moreover, newspapers which are unable to operate successfully under the Act will be forced to eliminate their out of state subscribers in order to remove themselves from any possible application of the Act. Furthermore, this Act does not treat all newspapers alike but classifies them for the purpose of regulation. This Court has held that classifica-

tion of newspapers for the purpose of regulation violates the First Amendment. *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936).

POINT 5. Under the terms of the Act, many of petitioner's competitors in the vicinity of Paterson are exempt from the burdens of the Act. All newspapers are engaged in exactly the same business and mere size affords no basis for regulation. The application of the Act to petitioner while its competitors are exempted constitutes an unreasonable, arbitrary and injurious discrimination in violation of its rights as guaranteed by the First and Fifth Amendments and is in conflict with the principles announced by this Court in *Grosjean* v. *American Press Co.*, *supra*.

ARGUMENT

POINT 1

The District Court was correct in holding that petitioner's return and answer tendered issues of jurisdictional fact and law which required it to determine at the outset whether petitioner's business is an industry subject to the Act.

The Administrator claims plenary power to decide for himself at the outset of an attempted investigation whether an employer is within the coverage of the Act.

Section 11(a) of the Act authorizes the Administrator to make investigations "in any industry subject to the Act" and Section 11(c) requires that "every employer subject to any provisions of this Act" shall make and keep certain records. The Administrator, purporting to act under authority conferred by this statute, issued an alleged subpoena duces tecum in an attempt to investigate petitioner's books and records without making any formal determination or showing that petitioner's business is an "industry

subject to this Act" or that petitioner is an employer "subject to any provisions of this Act."

Petitioner refused to obey the purported subpoena duces tecum on the ground that since neither it nor its employes were subject to the Act the Administrator was without authority to inspect its books and records. In its return to the order to show cause and answer to the petition of the Administrator for enforcement of the purported subpoena, petitioner denied essential jurisdictional facts, namely, that the Act is applicable to the business of petitioner; that the Administrator has jurisdiction over petitioner's affairs; and that the court had jurisdiction in the premises (R. 12). Petitioner also asserted as defenses that the attempted application of the Act to its business violated its rights as guaranteed by the First, Fourth and Fifth Amendments to the Constitution of the United States (R. 13).

The District Court held that petitioner had properly raised the issue of coverage. It sustained petitioner's contention that the Administrator was not entitled to enforcement of the subpoena unless such coverage was established on the ground that "if the act does not apply to a certain business or part of an industry, it would seem to follow that the provisions of the Act should not be applied thereto * * *." (R. 26.)

The District Court discharged the rule stating that since the Administrator had not had the "opportunity sufficiently to argue the question of coverage" the matter was left open for "such further proceedings as may be appropriate in the premises." (R. 28.)

The Administrator, however, did not take this opportunity to offer proof of coverage but appealed to the Circuit Court of Appeals for the Third Circuit to enforce the subpoena without proof of coverage. The majority of the

court sustained the Administrator stating that his allegations on information and belief that petitioner was subject to the Act constituted a sufficient showing to justify enforcement of the subpoena.

In so holding, the Circuit Court sacrificed the individual rights of citizens for administrative expediency. It has, in effect, denied petitioner its day in court. The proceeding in which petitioner was commanded to appear in the District Court on a certain day and show cause why an order should not be entered requiring it to comply with an alleged subpoena duces tecum served upon it by agents of the Administrator constituted process and gave petitioner its day in court. In order to enjoy the privileges of its day in court petitioner had the right to present its defenses. To hold, as did the Circuit Court, that petitioner had no such right is to give it its day in court in form but to deprive it in substance. The order directing petitioner to appear in court and show cause why the order should not be directed against it is meaningless if, as a practical matter, petitioner is not permitted to show cause.

Under the holding of the Circuit Court, the Administrator and his subordinates will be permitted to search the records of any citizen even though his business is conducted in such a manner as to be clearly free of control by the terms of the Act. The Circuit Court justified this holding by stating that "inspection of the records of a corporation is not regulation of the corporation * * *." (R. 91.) Such reasoning is unrealistic and completely disregards the rights secured to all citizens by the Constitution.

Petitioner contends that an investigation is lawful only when it is in aid of a lawful purpose and that the attempted investigation herein is unlawful since it is not in aid of a lawful purpose that is within the power of Congress to confer upon the Administrator. See *Kilbourn* v. *Thomp-*

son, 103 U. S. 168 (1881); *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1 (1936). No lawful purpose could be served by such an unauthorized search and so citizens should be permitted to raise the question of coverage at the outset of the proceeding. The time to stop the trespasser is at the threshold. *Ex parte Young*, 209 U. S. 123 (1908).

Furthermore, if the Circuit Court is right in holding that the question of coverage can be tried only in a proceeding to enforce the sanctions of Section 16 of the Act, a citizen, harassed by inspections, would have to violate the law deliberately and subject himself to the penalties imposed by that section in order to have the question of coverage determined by the courts. Surely Congress never intended that a citizen would have to violate the law deliberately in order to secure for himself the rights guaranteed by the Federal Constitution. A citizen not subject to the Act cannot violate it, yet, under this decision, he would be subject to the whims of the Administrator whenever the latter sought to investigate his records. He could not bar the trespasser at the threshold, as is his right against trespassers, and prohibit the illegal entry.

The decision of the Circuit Court of Appeals is in conflict with the decision of the Eighth Circuit Court of Appeals in *Walling* v. *Benson, supra,* in which that court pointed out that in determining whether it should enforce an investigatory subpoena a court "cannot sacrifice responsibility of action for mere ease in its performance" and must be satisfied that the Administrator has "reasonable ground" for believing that the respondent's business is subject to the Act.

As Judge McLaughlin pointed out in his dissent in this case, "No such showing was made, or even attempted, in the instant case." (R. 96.)

Here the Administrator has refused to make such a showing and has relied on mere assertions on information and belief that petitioner is subject to the Act.

This decision of the Third Circuit Court is also in conflict with the decision of the Sixth Circuit Court in *General Tobacco & Grocery Co.* v. *Fleming, supra.* In that case which arose under the same provisions of the Act as the controversy herein, the court held that where the answer of the respondent tenders an issue of fact on the jurisdictional question of interstate commerce the Administrator must show that the respondent is engaged in interstate commerce or in the production of goods for commerce. It denied the Administrator's claim that he had been accorded visitorial and inquisitorial power over all industry and stated:

> "* * * It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects." (125 F. 2d at p. 599.)

The more recent decision of the Sixth Circuit Court in *Walling* v. *LaBelle Steamship Co.*, 148 F. 2d 198 (1945), in no sense overrules its prior decision in the *General Tobacco Co.* case. In the *LaBelle Steamship Co.* case respondent, admittedly engaged in interstate commerce, resisted an attempted investigation by the Administrator on the ground that its employees were exempt from the Act as seamen. The court, in holding that respondent was not entitled to have the issue of coverage of its individual employees tried in this proceeding, distinguished the case from the *General Tobacco Co.* case in which the employer denied that it was en-

gaged in commerce or in the production of goods for commerce. Cases such as the *General Tobacco Co.* case and the present proceeding in which petitioner denied that it was engaged in commerce or in the production of goods for commerce and that it was subject to the Act are clearly distinguishable from cases in which part of a business is subject to the Act and only certain employees are exempt from its provisions.

The question whether a subpoena may be enforced without proof of coverage under the Fair Labor Standards Act has never been decided by this Court but much of the conflict among the Circuit Courts of Appeals on this question has resulted from this Court's decision in *Endicott Johnson Corp.* v. *Perkins, supra.* The Third Circuit Court of Appeals, in its opinion in the present case, stated that this Court's decision in the *Endicott Johnson* case was "persuasive" in determining the issues before it. It cited as authority for its holding in the present case two cases—*Martin Typewriter Co.* v. *Walling*, 135 F. 2d 918 (C. C. A. 1st, 1943), and *Walling* v. *Standard Dredging Corp.* 132 F. 2d 322 (C. C. A. 2d, 1943)—in which the Circuit Courts in *per curiam* opinions affirmed judgments enforcing subpoenas without proof of coverage on the authority of the *Endicott Johnson* case without any written opinion. It is submitted that in accepting this decision as authority for cases arising under the Fair Labor Standards Act the Circuit Courts failed to recognize the fundamental differences between the Walsh-Healey Act and the Fair Labor Standards Act.

In the Walsh-Healey Act, Congress provided a forum in which a respondent can be heard and authorized the Secretary of Labor to hold hearings and make decisions from which appeals are allowed and methods of appeal provided. The only forum available under the Fair Labor Standards Act is the court.

The other cases cited by the Third Circuit Court as authority for its decision are not applicable to the present case. It should be noted that there is a distinction between cases in which an industry is claimed to be wholly outside the coverage of the Act and cases in which some aspects of an industry are admittedly subject to the Act. Thus, in *Walling* v. *American Rolbal Corp.*, 135 F. 2d 1003 (C. C. A. 2d, 1943), the respondent admitted that it was lawfully required to produce the time cards, payroll records and names and addresses of all the employees in its plant but resisted the production of accounts payable records, including gross sale records. *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384 (C. C. A. 7th, 1940), *Cudahy Packing Co.* v. *Fleming*, 122 F. 2d 1005 (C. C. A. 8th, 1941), and *Cudahy Packing Co. of Louisiana* v. *Fleming*, 119 F. 2d 209 (C. C. A. 5th, 1941), are distinguishable since in none of those cases did the respondent tender an issue of jurisdiction and the parties were admittedly within the coverage of the Act. In *Mississippi Road Supply Co.* v. *Walling*, 136 F. 2d 391 (C. C. A. 5th, 1943), the company permitted inspection of the books and records which showed the nature of its business but refused inspection of its wage and hour records on the ground that its employees were not under the Act. The court, in enforcing the subpoena, stated that it appeared from the preliminary hearing that some of the employees were probably engaged in commerce and that there was some question as to whether the company was exempt as a retail and service establishment.

In this case, the Administrator sought to make a routine inspection in the absence of complaint or charge of violation of law. When afforded an opportunity by the District Court to attempt to make such a showing as would entitle him to inspect under the Act, he refused. Rather, in an effort to obtain judicial sanction for the invasion of the

Fourth Amendment in such a way as to give him authority to snoop through anyone's books, papers and records in the hope of turning something up and in the absence of reasonable cause or any cause whatsoever, he took the steps that have now brought the issue to this Court.

It is respectfully submitted this Court should reverse the Circuit Court and sustain the District Court and so protect petitioner from the unlawful inspection attempted by the Administrator.

POINT 2

The Circuit Court of Appeals' order permitting the Administrator, in the absence of complaint, to fish through petitioner's books, papers and records for the purpose of determining whether or not it has violated the Act violates petitioner's rights as guaranteed by the Fourth Amendment.

The Administrator in this proceeding has asserted the power to make a general fact-finding investigation of the books, papers and records of all businesses and industries in the United States in aid of enforcement of the Act without reference to any probable cause and without a specific charge of violation of law. The power asserted is an executive power by which the Administrator seeks to police the enforcement of the Act herein.

The record shows and the District Court found that in the present case the Administrator began his attempted investigation of petitioner's business "without complaint and simply in quest of information upon which to base proceedings should they be justified * * *." (R. 25.)

In fact, the investigation of petitioner's business was initiated as a part of a program of making routine investigations of all forms of business and industry in the United

States, in the absence of complaint or charge of violation of law, for the purpose of turning up violations (R. 63-66).

Congress, in enacting the Fair Labor Standards Act, did not intend to authorize such a program. On the contrary, it has continuously expressed its emphatic disapproval of this policy.

The 77th Congress reduced the budget of the Wage and Hour Division for the fiscal year 1942 by eliminating an item of $350,000 requested for inspection purposes. In its report to the House, the House Appropriations Committee said:

> "As a matter of policy, the committee is unable to find any justification for placing the inspection on a basis of inspecting each and every plant that might be covered by the act. There are many enforcement statutes of all kinds being administered by various agencies of the Government. If the Government were to adopt a policy of inspecting every unit of production or every individual that might be covered by these acts, the cost would be staggering and all out of proportion to the benefits to be obtained thereby." (See House Report No. 688, 77th Cong., 1st Sess., June 2, 1941, pp. 13-14. See also Cong. Record, Vol. 87, p. 4742, June 2, 1941.)

The Senate reinstated the item in the bill. The measure then went to conference. The House unanimously instructed its conferees to insist upon the elimination of the item. This they did and the Senate yielded. In asking for instructions, Representative Tarver, Chairman of the House Sub-Committee, said:

> "We have moved here that the House insist upon its disagreement to the Senate amendments. We repeat the statement which was made in the presentation of the bill originally that if the House feels that this wholesale investigation of the plant of every employer in the United States should be made, then you ought to

vote down the motion which is now being offered." (See Cong. Record, Vol. 87, p. 5799, June 28, 1941; *Ibid.*, pp. 5799-5802 for further discussion and action by the House; *Ibid.*, p. 5820, June 30, 1941, for Senate approval of House action.)

Notwithstanding the express condemnation of his routine investigations, the Administrator announced he intended to continue them. (See speech of Philip B. Fleming, Administrator Wage and Hour Division, U. S. Department of Labor, before Mississippi State Federation of Labor, Meridian, Miss., July 15, 1941. See 4 Wage and Hour Reporter 393-394.)

The announced intention of the Administrator to continue his policy of routine inspection was carried out and was again condemned by Congress.

Reporting on the Department of Labor Appropriation bill for 1943, the House Appropriations Committee again reduced the amount available to the Wage and Hour Division for inspection purposes, this time by the sum of $250,700. After referring to its expression of policy stated in the report of the previous year, the Committee condemned the failure of the Administrator to adopt its recommendations and commented:

> "The Congress cannot pursue these matters into the administrative branch of the Government and enforce its own directions, and must of necessity rely upon the officials of the various departments to carry out faithfully the policies established and the directives given to them by the Congress, but adequate methods for securing compliance are available to the Congress if administrative officers do not heed congressional intent as expressed in reports and debates." (House Report No. 2200, 77th Cong., 2d Sess., June 3, 1942, p. 8.)

The bill as enacted reduced the appropriations bill for that fiscal year as recommended by the Committee.

Congress has continued to express its disapproval of the Administrator's policy of making routine inspections by limiting the funds available for such purposes. Although the Administrator recently warned the House Appropriations Committee that the Wage Hour Division had been forced to cut down its inspections and could not adequately enforce the Act under its reduced budget, the Committee, in reporting out the Labor-Federal Security Appropriations bill for 1946, recommended a further cut in the Wage Hour Division's appropriation. It recommended only $3,804,670 which was $707,330 less than the amount voted the Division for 1945 and $10,530 less than the amount recommended in the Budget estimate. Both the House and the Senate agreed to this reduction in the appropriation for the Division.

Petitioner has shown under Point 1 that since no lawful purpose could be served by an investigation of its business unless it is covered by the Act, an investigation without a prior determination that it is subject to the Act would violate its rights as guaranteed by the Fourth Amendment. This violation is even more flagrant in the present case where the investigation was begun without complaint and solely in a quest for information. Such an investigation is nothing more than the "fishing expedition" condemned by this Court in *Federal Trade Commission* v. *American Tobacco Co., supra.*

The origin of the *American Tobacco Co.* case is especially significant for the reason that the Federal Trade Commission had asserted the same power of general inspection in the absence of complaint or charge of violation of law as the Administrator now asserts in respect of business and industry generally in the United States. It is also noteworthy, in the light of the history of the administration of the Federal Trade Commission Act, that Congress ap-

plied the procedural provisions of that law to the enforcement of the Fair Labor Standards Act.

Reference to the Federal Trade Commission Act shows that the Commission is empowered to gather and compile information concerning and to investigate from time to time the organization, business conduct, practices and management of any corporation engaged in commerce and its relation to other corporations and to individuals, associations and partnerships. In 1921, the Commission asserted a claim of an unlimited right of access to the records and papers of firms engaged in the tobacco business to the same effect as the Administrator is claiming in this case.

The Chairman of the Commission on October 26, 1921, in a letter to counsel for the American Tobacco Company which appears in the record of *Federal Trade Commission* v. *American Tobacco Co., supra,* at pages 16-18, said in respect of Section 9 of the Federal Trade Commission Act:

> "The Commission understands this paragraph to mean that the Commission has an unlimited right of access to the books and records of a corporation under investigation or being proceeded against, at all reasonable hours and to make copies therefrom. It also has the power to require the attendance of witnesses and the production of documentary evidence by subpoena. But the exercise of the right of access, examination, and copying is not dependent upon the prior issue of subpoena."

The Chairman of the Commission further pointed out in his letter that the Commission was proceeding with its examination under the power referred to which it alleged was conferred upon it by Section 9 of the Act—which section is the section which the Administrator has invoked in this pending case.

He further informed counsel for the Tobacco Company that the Commission found no "*limitations in the statutory*

statement of the powers conferred upon the commission, or the duties devolving upon it thereunder." (Emphasis supplied.)

The American Tobacco Company refused to recognize the assertion of power by the Federal Trade Commission and this Court upheld the company. The condemnation uttered by Mr. Justice Holmes of the power which the Federal Trade Commission attempted to assert in 1921 is just as applicable to the power which the Administrator is now attempting to assert under the same section of the same statute.

While the *American Tobacco Company* case was on its way to this Court, the Federal Trade Commission demanded that the Baltimore Grain Company submit its books to inspection by the designated representatives of the Commission. The company refused; whereupon a writ of mandamus was sought to compel compliance with the Commission's demand.

The District Court refused the writ and its action was affirmed by this Court upon the authority of the *American Tobacco Co.* case. *Federal Trade Commission* v. *Baltimore Grain Co.*, 284 Fed. 886 (District Court, D. Maryland, November 20, 1922), affirmed in 267 U. S. 586 (1925).

As Mr. Justice Holmes said in the *American Tobacco Co.* case:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire * * * and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. * * *
>
> "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." (264 U. S. at pp. 305-306.)

It is thus apparent from the record before this Court that what the Administrator is trying to do is the very thing which was condemned by this Court in the *American Tobacco* case.

The Administrator here seeks to make investigations outside the scope of the statute and to ferret out possible violations of the law.

We have to go back more than 180 years in our history to find a parallel to a proceeding such as this, and when we locate it we find it in the use of the notorious writs of assistance which were issued by the Royal Court for the enforcement of the revenue laws.

In 1662, during the reign of Charles II, an act was passed to regulate the publication of books in the hope of stamping out utterances of a disloyal nature. This act authorized the issuance of general warrants directing the messengers to search in any place where they knew or had reason to suspect that books were being printed to ascertain whether the books were properly licensed and contained lawful matters.

In the same year the same session of Parliament which enacted the licensing act under which general warrants for the hounding of seditious publications were authorized enacted equally drastic measures for the enforcement of the revenue laws. The chief weapon of enforcement was the writ of assistance.

Nearly one hundred years later, the Prime Minister of England invoked the use of these writs of assistance in the Colony of Massachusetts in an effort to quiet the resentment against taxation without representation. A writ of assistance was a blanket permit issuable to any person in the court's discretion authorizing him to search any suspected place for goods on which duties had not been paid.

Violent opposition to the use of writs of assistance arose in Massachusetts in 1761 and in that year occurred the great

argument in what has been known in history ever since as *Paxton's* case, Quincy (Mass.) 51 (1761).

James Otis resigned his position as Advocate General to the Crown rather than defend the use of writs of assistance by the courts of the Crown and appeared in opposition to their use. In the course of his argument he denounced the use of those writs as

> "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law book."

He declared that they placed

> "the liberty of every man in the hands of every petty officer."

Otis lost that case because the court held that the use of the writs was essential to the power of the government to enforce the law.

The same argument is made here today that general inspection of the books, papers and documents of every one engaged in business or industry in the United States is necessary to aid the Administrator of the Wage and Hour Division in the enforcement of the Fair Labor Standards Act. The Administrator has placed no limitation as to frequency of inspection upon his inspectors. Rather he has specifically authorized them to inspect at will and repeatedly thereafter.

The opposition kindled by the Massachusetts colonists' resistance to the notorious writs of assistance spread throughout the colonies. In 1773, the committee of 21 chosen to state the grievances of the colonists complained that their homes had been opened to unlimited inspection at the hands of

"wretches whom no prudent man would venture to employ even as menial servants, whenever they are pleased to say they suspect there are in the house wares for which the duties have not been paid."

The Continental Congress, in its Memorial of the Inhabitants of the British Colonies, remonstrated against the practice of unbridled search and seizure. Each of the colonies in turn, after the Declaration of Independence, in setting up its own government inserted clauses in its state constitution or bill of rights declaring these general search warrants unlawful.

Finally, after the war for independence was won and the Constitutional Convention submitted the original Constitution to the people of this country for ratification, there was such an objection to it because of the failure to include a Bill of Rights that the Constitution would not have been ratified had not the framers thereof consented to propose at the first session of Congress to be held after ratification a series of amendments embracing, among other things, prohibitions against the abridgment of freedom of the press and against unlawful searches and seizures.

The language of the Fourth Amendment is almost identical to the language in the Massachusetts Declaration of Rights of 1765, which was written as a result of the controversy over the use of the writs of assistance.

The parallel is deadly and complete. The Administrator is acting in the role of a prosecutor. Through a host of subordinates to whom he purports to delegate power to probe into all of the records of petitioner as part of a general program of inspection of all business, he is reviving the writs of assistance in another guise. The inspectors and investigators of the Administrator are like the prowlers of old who were armed with writs of assistance to ferret out possible violations of law.

Again are heard the same arguments based upon expediency and the need for effective enforcement. These arguments were only too well known to the framers of the Fourth Amendment which was itself an answer to such arguments.

That Amendment still stands in our Constitution. It should be recognized by this Court as a bulwark against the invasion of individual rights attempted by the Administrator herein.

POINT 3

The Administrator could not have proved coverage in the present case because petitioner is not engaged in commerce or in the production of goods for commerce within the meaning of the Act.

The fact that petitioner receives news, feature articles and materials from out of state does not bring petitioner within the coverage of the Act. This Court, in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (1943), at page 571, stated that "* * * we cannot conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate." And, in the companion case, *Higgins* v. *Carr Brothers Co.*, 317 U. S. 572 (1943), the Court held the Act inapplicable to a business which imported materials from out of state where the goods came to rest within the state and there was no actual or practical continuity of movement of materials from without the state.

It is common knowledge that news reports or features obtained from interstate press wire services are not disseminated to readers exactly as they reach the office of a newspaper like petitioner's. All news stories are first read and then selected or discarded. Those that are selected must be edited to suit the needs of the paper. Heads and

subheads are written. The copy then goes to the composing room where it is set in type and placed on a page form. A mat is made of the entire page form, a cylinder is then cast from the mat and the cylinder then goes on the press.

Furthermore, the supplies such as newsprint and ink which petitioner receives from out of state are changed into an entirely new article before they are passed on to petitioner's readers.

Thus, it is clear that there is no actual or practical continuity of materials from outside the state to petitioner's readers. There is a definite "break" or termination of the interstate movement of the materials.

The fact that a newspaper publisher does not merely pass on to his readers the materials which he has received but sells them an entirely new article was recognized by the United States Court of Appeals for the Fourth Circuit in *Schroepfer* v. *A. S. Abell Co.*, 138 F. 2d 111 (1943) (certiorari denied, January 17, 1944; rehearing denied, May 22, 1944), when it stated:

> "* * * there can be no question but that the interstate movement of materials used in the publication of papers, including news reports and other matter published, ended when they were delivered to defendant. Defendant used them as it saw fit in producing its papers and did not pass them on to its customers, as a telegraph company or a news service might have done. What occurred, therefore, was not mere 'milling in transit' but the production of an entirely new article of commerce in which the news received interstate was merely one of the ingredients." (138 F. 2d at p. 114.)

The New York Supreme Court, Appellate Division, in its decision in *Mabee* v. *White Plains Publishing Company, Inc.*, 267 App. Div. 284, 45 N. Y. S. 2d 47[9] (1943), which was unanimously affirmed by the Court of Appeals, 293 N. Y. 781

(1944), followed the *Schroepfer* decision and rejected the contention that the receipt of materials from out of state for use in the production of a newspaper brought the newspaper within the coverage of the Act.

This Court has held that the business of preparing, printing and publishing a newspaper is peculiarly local and distinct from its circulation, whether or not that circulation crosses state lines. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). See also *Blumenstock* v. *Curtis Publishing Co.*, 252 U. S. 436 (1920).

As the court pointed out in *Mabee* v. *White Plains Publishing Company, Inc., supra*, the business of publishing a local newspaper is a "strictly local as distinguished from a national activity" and is not covered by the Act. The record in this case shows that petitioner's newspaper is essentially a local community enterprise rendering service to the community in the immediate vicinity of its office of publication (R. 43-46, 50-53). Thus, it falls within the category of local business which Congress left to the protection of the states. *Walling* v. *Jacksonville Paper Co., supra.* And, as this Court recently pointed out in *10 East 40th Street Building, Inc.* v. *Charles Callus, et al.*, 89 L. ed. 1244 (advance opinions) (1945), courts must be alert "not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

The fact that only one per cent of its total circulation goes outside of the State of New Jersey does not bring petitioner's business within the purview of the Act.

As this Court has stated, "the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the im-

pairment or destruction of local businesses by competition made effective through interstate commerce." *United States* v. *Darby*, 312 U. S. 100 (1941) at p. 122. On the record herein, it is plain that the trifling out of state circulation which is purely incidental to petitioner's local service could not possibly have a substantial economic effect on interstate commerce. The papers going out of state do not compete with the local newspapers in the communities they enter and could not possibly impair or destruct the business of these local newspapers.

This out of state circulation falls within the *de minimis* doctrine.

This Court in *N. L. R. B.* v. *Fainblatt*, 306 U. S. 601 (1939), recognized that there were cases arising under the National Labor Relations Act in which the courts would apply the *de minimis* doctrine. Since, as the Court pointed out in *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517 (1942), and *Walling* v. *Jacksonville Paper Co., supra*, the Fair Labor Standards Act is not as broad in its scope as the National Labor Relations Act, it is clear that there are cases arising under the Fair Labor Standards Act in which the courts should apply the doctrine of *de minimis*.

In a number of cases arising under the Act, the courts have applied this doctrine by holding that where the interstate business of the employer constitutes only a small portion of the total business and where it is not an integral part of the service rendered the Act does not apply. *Goldberg* v. *Worman*, 37 F. Supp. 778 (S. D. Florida, March 18, 1941); *Rauhoff* v. *Henry Gramling & Co.*, 42 F. Supp. 754 (E. D. Arkansas, August 22, 1941); *Zehring* v. *Brown Materials*, 48 F. Supp. 740 (S. D. California, January 19, 1943); *Cron* v. *Goodyear Tire & Rubber Co.*, 49 F. Supp. 1013 (M. D. Tennessee, April 28, 1943); *Sapp et al.* v. *Horton's Laundry*, 56 F. Supp. 901 (N. D. Georgia, January 18, 1944);

Mabee v. *White Plains Publishing Company, Inc., supra.* The present case falls within this category.

Thus, it is clear that the Administrator could not have proved that petitioner is subject to the Act. The Circuit Court's decision to permit him to inspect petitioner's books and records was without lawful basis and a flagrant violation of petitioner's rights.

Point 4

The application of this Act to petitioner's newspaper publishing business would violate its rights as guaranteed by the First Amendment.

The Circuit Court of Appeals erroneously interpreted petitioner's First Amendment argument when it stated that the substance of this argument was that "such an investigation as that proposed by the Administrator would violate the guarantee of freedom of the press." (R. 95-96.) Actually, petitioner contended, as has been previously shown under Point 1, that no lawful purpose could be served by permitting an inspection of its business by the Administrator if it is not subject to the provisions of the Act. Petitioner further pointed out that it could not be covered by the Act for the application of this Act to its newspaper publishing business would violate its rights as guaranteed by the First Amendment.

The Act here in controversy is not a general law affecting all persons alike. Section 13 of the Act exempts many types of employees from the so-called "benefits" of the Act. Furthermore, it exempts numerous entire businesses and industries from the burdens of the Act. Still further, as originally enacted, only one business in the entire range of business and industry was classified in the Act for the purpose of regulation.

That business was the newspaper publishing business.

Under the provisions of Section 13(a)(8) all weekly and semi-weekly newspapers with a circulation of less than 3,000, the major part of which circulation is within the county where printed and published, are exempted from the minimum wage and overtime provisions of Sections 6 and 7 of the Act. All other newspapers whether weekly, semi-weekly, tri-weekly, daily, Sunday or daily and Sunday are subjected to the burdens of Sections 6 and 7 of the Act.

A study conducted by the Wage and Hour Division shows that of a total of 13,476 newspapers published in 1938, daily, daily and Sunday, weekly, semi-weekly and tri-weekly, 10,379, or 77 per cent of the total, had circulations under 3,000, while 11,496, or 85 per cent of the total, had circulations under 5,000. In the weekly, semi-weekly, and tri-weekly fields 9,775 or 91 per cent of the total in these fields, had circulations under 3,000. In the daily field 521, or 25 per cent of all dailies, had circulations under 3,000 and in the Sunday field 101, or 17 per cent of all Sundays, had circulations under 3,000.

In the group between 3,000 and 5,000 circulation, 489 were weeklies and 467 dailies.

In the group between 5,000 and 10,000 circulation, 233 were weeklies, semi-weeklies and tri-weeklies and 455 dailies. Only 654 dailies and 218 weeklies, semi-weeklies and tri-weeklies had over 10,000 circulation. Practically all of 9,755 weekly and semi-weekly newspapers have less than 3,000 circulation. These, constituting 72 per cent of all newspapers published in the United States and 91 per cent of all weekly and semi-weekly newspapers published in the United States, are exempted from the burdens of the Act (Small Daily Newspapers Under Fair Labor Standards Act, Wage and Hour Economics Division, June, 1942).

Analysis of the provisions of Section 13(a)(8) shows that Congress classified the press for the purposes of the regulation provided in this Act on the basis of volume of circulation, frequency of issue and area of distribution.

This Court has held, in *Murdock* v. *Pennsylvania, supra,* that even a general law applying to all persons alike if it lays a direct burden on the business of the press must be nullified as to the press by reason of the prohibition against restraint contained in the First Amendment.

This Act lays a direct burden on the press. The business of preparing and publishing a daily newspaper is peculiar in that it demands a high degree of flexibility in operation (R. 46-47, 53-54). If a publisher is limited in his operations by the application of the burdens of this Act, he will be unable to serve his readers adequately.

Newspapers which are unable to operate successfully under this Act will be forced to restrict circulation. If it is held that this Act can be applied to petitioner, it will be forced to eliminate its out of state subscribers. This will deprive these persons of a service to which they are entitled under the provisions of the First Amendment which was written not to guarantee a special privilege to persons engaged in a particular type of business but to guarantee to the citizens of this country the right to have information of vital public importance free from government control or restraint. This Court has held that such restriction of circulation violates the guaranty of the First Amendment. *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Schneider* v. *State,* 308 U. S. 147 (1939); *Near* v. *Minnesota,* 283 U. S. 697 (1931); and *Grosjean* v. *American Press Co., supra.*

This Act regulates the press by classifying it. If Congress has the power to classify the press as it has done here it can exercise that power so as to benefit or burden

any portion of the press it so desires. This is obvious from the very nature of the factors used by Congress for its classification.

The use of one of these factors, the only one used in fact by the State Legislature of Louisiana, was condemned by this Court in *Grosjean* v. *American Press Co., supra.*

The notorious Huey Long legislature when it sought to penalize those newspapers in Louisiana which were opposed to the Long regime enacted a tax law aimed at silencing the anti-Long press. The legislature classified the press of Louisiana on the single basis of volume of circulation, levying the tax on all newspapers with a circulation in excess of 20,000 per week and exempting all newspapers in Louisiana with a circulation of less than 20,000 per week.

In this Act Congress has not only applied volume of circulation as used by the Louisiana legislature as one of its factors for classifying the press but has added two more, namely, frequency of issue and the area in which a newspaper is distributed. The very use of these factors serves to restrict circulation and deprive the people of their rights to information which our forefathers guaranteed them under the First Amendment.

That Amendment prohibits any such exercise of the power here asserted by Congress.

POINT 5

Application of Sections 6 and 7 to petitioner's business would constitute an unreasonable, arbitrary and injurious discrimination against petitioner in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution.

As has been pointed out hereinbefore Section 13(a)(8) of the Act classifies the press on the basis of volume of circulation, frequency of issue and area of distribution in such

a way as to exempt from the burdens of Sections 6 and 7 more than 72 per cent of all newspapers published in the United States.

Among the newspapers freed from those burdens are many weekly newspapers published in the vicinity of Paterson (R. 70-71). The newspaper published by petitioner is engaged in identically the same business as the weekly newspapers with circulations of less than 3,000 with which it competes. Whether a newspaper be weekly, semi-weekly, tri-weekly, daily, daily and Sunday or Sunday only, its business is exactly the same as that of all other newspapers. That business is the gathering and dissemination of three classes of information in the printed form—news, editorial comment and advertising (R. 43, 50). Mere size affords no basis for regulating certain newspapers and exempting all others.

Therefore, it follows that the application of Sections 6 and 7 to petitioner would constitute an unreasonable, arbitrary and injurious discrimination in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution and is in conflict with the principles announced by this Court in *Grosjean* v. *American Press Co., supra.*

CONCLUSION

It is respectfully submitted that on the record and the authorities cited the Administrator was without authority to inspect petitioner's books and records and the Circuit Court's holding that he may make such an inspection was a flagrant violation of petitioner's rights as guaranteed by the Constitution. This Court should reverse the Circuit

Court and grant such other and further relief as to the Court may seem proper.

Respectfully submitted,

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